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Supreme Court of the United States
OCTOBER TERM, 1990

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENT

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organizations in the United States. It represents the interests of over 180,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations. The vast majority of its members are subject to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et. seq.* (1982) ("Title VII")) and to the Occupational Health and Safety Act (Pub. L. 91-596, 84 Stat. 1590 (1970)

* Counsel for all parties have consented to the filing of this amicus brief. *Amicus* has filed those consents with the Clerk of this Court.

(codified at 29 U.S.C. § 651 *et. seq.* (1988)) ("OSH Act")).

The Chamber is filing this brief *amicus curiae* in support of respondent because it believes that preservation of the right of employers to adopt fetal protection policies and other voluntary policies to safeguard the health of their employees is important. Such voluntary programs reflect both sound business practice and good corporate citizenship and are consistent with, indeed serve, the goals of applicable federal legislation.

SUMMARY OF ARGUMENT

Petitioners urge that Congress in the Pregnancy Discrimination Act (Title VII § 701(k), 42 U.S.C. § 2000e(k) (1982) ("PDA")) required employers to blind themselves to the risks of birth defects caused by various substances, risks recognized by a wide variety of federal agencies and that are particularly acute in the case of lead.

Congress had no such intent in enacting the PDA. In the PDA, Congress sought to restore in the area of pregnancy the disparate treatment theory rejected by this Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). But in doing so, Congress required only that employees who are pregnant or are affected by "related medical conditions . . . be treated the same . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The legislative history of the PDA confirms this purpose, repeatedly emphasizing the requirement of equal treatment of similarly situated employees. Nothing in the legislative history indicates that the statute was designed to foreclose consideration of employee and fetal health. To the contrary, preservation of fetal health was a central goal of the legislation.

This interpretation of the PDA is buttressed by the need to reconcile the PDA with the Occupational Health and Safety Act (Pub. L. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. § 651 *et seq.* (1988)) ("OSH

Act")). The OSH Act embodies a strong federal policy of encouraging voluntary employer action to protect the health of employees and the children they bear. Consistent with this Court's decisions requiring the reconciliation of federal statutes, the Court should not construe the PDA to undermine this important purpose of the OSH Act.

Finally, petitioners have not shown that the employer's fetal protection policy in this case violates the standards of the PDA. The burden of proof to establish disparate treatment rests on the plaintiffs. Petitioners make no claim that the employer's action was pretextual or arbitrary, and they have made no showing that the employer treated similarly situated employees differently. As the Court of Appeals concluded, the evidence of similar risks of birth defects through male exposure was "speculative," and petitioners failed to shoulder their burden of showing the existence of similar risks through exposure of men. Accordingly, petitioners have made no showing of unequal treatment.

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS REPEATEDLY EXPRESSED CONCERN OVER THE DANGERS OF BIRTH DEFECTS RESULTING FROM MATERNAL EXPOSURE TO VARIOUS SUBSTANCES INCLUDING LEAD.

Petitioners cannot dispute that preventing birth defects by reducing or eliminating occupational exposure to certain substances is a "legitimate and significant" societal interest.[1] Nor do they deny that lead is a toxic substance. Indeed, petitioners admit that lead "poses a risk of significant harm to fetuses of pregnant workers" (Pet. Br. 5), and the District of Columbia Circuit has characterized that risk as a "grave danger."[2] Petition-

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[1] *See, e.g.*, Br. *Amici Curiae* of State of California, *et al.* 2.

[2] *United Steelworkers v. Marshall*, 647 F.2d 1189, 1256 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

ers also do not deny that congenital lead poisoning may create irreversible fetal damage[3] and did not argue that there is any reasonable way to preclude congenital lead poisoning other than exclusion of women from the workplace where high levels of lead are present.[4] Petitioners' concessions are not surprising. The federal government's Centers for Disease Control ("CDC") have concluded that "[t]he prevention of lead exposure to the fetus needs special emphasis. Women of child-bearing age should be excluded from working at jobs where significant lead exposure occurs." JA 184.

Additionally, over the past decade, a host of other federal agencies have issued warnings concerning prenatal exposure to various substances.[5] For example, the federal government has warned pregnant women against even moderate alcohol consumption which, although not endangering the woman's health, may cause severe birth defects,[6] and requires that warnings regarding the possible adverse effects of alcohol consumption during pregnancy be printed on all alcoholic beverage containers.[7] Federal law also requires cigarette manufacturers to place on all cigarette packages and in cigarette advertisements conspicuous warnings that smoking may com-

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[3] *See* Chisolm Aff. ¶ 6, JA 199; Scialli Aff. ¶¶ 7, 10, JA 180-81.

[4] *See* Resp. Br. 12.

[5] The tort protection the common law affords to unborn and newborn children also reflects society's concern for fetal health. *See* Resp. Br. 27-28.

[6] U.S. Dep't of Health, Educ. & Welfare, *Drugs and Pregnancy*, at 3, *reprinted from* FDA Consumer (Oct. 1978); U.S. Dep't of Health & Human Services, *My Baby . . . Strong and Healthy*, at 5-7 (1986); U.S. Dep't of Health & Human Services, *Drugs and Pregnancy: Often The Two Don't Mix*, at 3, *reprinted from* FDA Consumer (June 1989).

[7] 27 U.S.C. § 215(a) (1988). The required warning reads "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects." *Id.*; 55 Fed. Reg. 5414, 5416 (1990).

plicate pregnancy.[8] Governmental agencies also warn pregnant women to refrain from all drug use, including aspirin, because drugs may have detrimental health effects on the children they bear.[9] In appropriate cases, the government itself has banned fertile women from jobs involving particularly toxic substances. For example, in an effort to prevent "abnormal children," the Environmental Protection Agency has banned women of child-bearing age from all jobs involving application of Ferriamicide, a pesticide particularly likely to cause birth defects through maternal exposure.[10]

The federal government has expressed especially strong concern over congenital defects resulting from lead poisoning. In addition to the CDC (*see supra* p. 4), two other federal agencies—the Environmental Protection Agency and the Consumer Product Safety Commission--have reported that:

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[8] 15 U.S.C. § 1333(a) (1988). One of the mandated warnings reads "SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight." 15 U.S.C. § 1333(a)(2).

[9] *Drugs and Pregnancy*, *supra*, at 1; *Drugs and Pregnancy: Often the Two Don't Mix*, *supra*, at 1-4. Federal law requires that warnings be placed on the labels of many over-the-counter medications. *See, e.g.*, 55 Fed. Reg. 27,776 (1990) (requiring new warning statement in addition to general pregnancy-nursing warning to appear on all over-the-counter aspirin and aspirin-containing products: ". . . IT IS ESPECIALLY IMPORTANT NOT TO USE [ASPIRIN] DURING THE LAST THREE MONTHS OF PREGNANCY UNLESS SPECIFICALLY DIRECTED TO DO SO BY A DOCTOR BECAUSE IT MAY CAUSE PROBLEMS IN THE UNBORN CHILD OR COMPLICATIONS DURING DELIVERY.").

[10] *See Women Prohibited from Using Pesticide: EPA Defends Decision as "Justifiable,"* O.S.H. Rep. (BNA) 1481-82 (Feb. 22, 1979) (quoting letter of EPA Deputy Administrator, Barbara Blum). *See also* 43 Fed. Reg. 47,774, 47,776, 47,786 (1978); 44 Fed. Reg. 11,111, 11,112, 11,117 (1979); 47 Fed. Reg. 46,884, 46,885 (1982) ("All applications [of Ferriamicide] will be made by certified applicators only. . . . Women of child-bearing age are prohibited from loading/applying Ferriamicide.").

> Fetuses, infants and children are more vulnerable to lead exposure than adults since lead is more easily absorbed into growing bodies, and the tissues of small children are more sensitive to the damaging effects of lead. In addition, an equal concentration of lead is more damaging because of a child's smaller body weight.[11]

The Department of Housing and Urban Development's Lead-Based Paint Interim Guidelines require workers involved in lead abatement projects to undergo special training to learn about the health hazards of lead:

> The training program should include information from recent research studies indicating that (1) lead is transferred from the mother to the fetus during pregnancy, and (2) exposure of the fetus to lead, even at low concentrations, is associated with developmental effects.[12]

Finally, the Federal government has published extensive research findings on the possible long-term negative effects of prenatal exposure to lead:

> The effects of lead exposure on fetuses and young children include delays in physical and mental development, lower IQ levels, shortened attention spans, and increased behavioral problems.[13]

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[11] U.S. Environmental Protection Agency and Consumer Product Safety Comm'n, *The Inside Story, A Guide to Indoor Air Quality*, at 25 (Sept. 1988). *See also* U.S. Environmental Protection Agency, *Lead and Your Drinking Water*, at 2 (April 1987); U.S. Environmental Protection Agency, *Air Quality Criteria for Lead*, Vol. IV, at 13-46 (June 1986) ("pregnant women and their concepti as a subgroup are demonstrably at higher risk [than men]").

[12] Lead-Based Paint: Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing, 55 Fed. Reg. 14,556, 14,581 (1990). *See also Air Quality Criteria for Lead*, *supra*, at 13-46 ("[u]mbilical cord blood studies involving mother-infant pairs have repeatedly shown a correlation between maternal and fetal blood lead levels"); *Lead Poisoning Prevention Program: Hearings Before the Subcomm. on Toxic Substances, Environmental Oversight, Research and Development of the Senate Comm. on Environment and Public Works*, 101st Cong., 1st Sess. (1990) (testimony of Kathryn Mahaffey, Ph.D.).

Petitioners would require employers to ignore the undeniably substantial risks of birth defects caused by congenital lead poisoning. Neither logic nor federal law requires that result.

II. THE PREGNANCY DISCRIMINATION ACT DOES NOT BAR VOLUNTARY EMPLOYER ACTION TO PROTECT EMPLOYEES AND THEIR OFFSPRING FROM EXPOSURE TO TOXINS IN THE WORKPLACE.

Petitioners and their *amici* urge, as one of their arguments for reversal, that this case is governed by the Pregnancy Discrimination Act (42 U.S.C. § 2000e(k) ("PDA"))[14] a federal statute designed to define the circumstances in which distinctions on grounds of pregnancy or "related medical conditions" constitute intentional discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (1982) ("Title VII")).[15] We agree, but reach diametrically opposite conclusions as to the purpose and scope of that statute.

Relying on the first clause of the PDA, which states that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions" (42 U.S.C. § 2000e(k)), petitioners and their *amici* argue that Congress designed the PDA to make any dis-

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[13] *The Inside Story*, *supra*, at 25. *See also* National Institute of Environmental Health Sciences, Conference Summary, *Advances in Lead Research: Implications for Environmental Health* (Jan. 16-18, 1989); *Lead and Your Drinking Water*, *supra*, at 2; *Air Quality Criteria for Lead*, *supra*, at 13-46; Lead-Based Paint: Interim Guidelines, *supra*, at 14,561.

[14] Pet. Br. 16-20. *See, e.g.*, Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 1.

[15] Petitioners also argue (Pet. Br. 12-16) that this is an ordinary gender discrimination case, a contention that is clearly inconsistent with this Court's decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). *See infra* pp. 8-10.

tinction between pregnant female employees and male employees unlawful. *See* Pet. Br. 17, 20; Br. *Amici Curiae* Equal Rights Advocates, *et al.* 19. In this respect, these parties virtually ignore the second clause of the PDA, which provides: "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). That clause, and the legislative history of the PDA, make clear that the purpose of the PDA was to apply disparate treatment theory to pregnancy. At the same time, the plain language of the statute requires that the comparison be made between women affected by pregnancy and related medical conditions and other persons with similar medical conditions that affect their ability to work.[16] Because the employer's policy does not involve impermissible disparate treatment under the PDA, this Court need not reach the question whether the BFOQ defense is available to the employer.[17]

A. The PDA Restored the Disparate Treatment Theory's Application to Pregnancy-Related Policies.

By overruling this Court's decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the PDA restored the disparate treatment theory to plaintiffs' arsenal when challenging pregnancy-related policies. At the same time, the PDA defined how the Courts should apply the disparate treatment theory to pregnancy and "related medical conditions," conditions which, by definition, apply only to women and which were viewed as both warranting and requiring special consideration in the employment context.

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[16] All parties appear to agree that "related medical conditions" includes the condition involved here—the ability of a woman to bear children. *See, e.g.*, Pet. Br. 17; Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 13.

[17] As urged by respondent, we agree that such a defense is available.

The relevant judicial history began well before *Gilbert*. From the very outset, § 703(a)(1) of Title VII clearly banned disparate treatment based upon "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1) (1982). In 1971, seven years after the passage of Title VII, this Court first embraced an entirely different theory of discrimination, the disparate impact theory, brought under a different statutory provision, (§ 703(a)(2) (*Id.* § 2000e-2(a)(2)). *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Disparate impact claims brought pursuant to § 703(a)(2) "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." [18]

This Court has invoked both disparate treatment and disparate impact theories, and, correlatively both §§ 703(a)(1) and 703(a)(2), to invalidate employer policies as discriminatory against women.[19]

In *Gilbert*, the Court faced its first Title VII challenge to an employer's pregnancy-related policy. The employer's nonoccupational sickness and accident disability plan excluded from coverage disabilities arising from pregnancy, thus treating women who were unable to work because of pregnancy differently than employees suffering other disabling conditions. The Court held this policy did not constitute disparate treatment in violation of Title VII because there " 'is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' " [20]

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[18] *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977).

[19] *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (disparate treatment theory relied on to strike down an employer's refusal to hire women, but not men, with pre-school-age children); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (state minimum height and weight requirements for prison guards invalidated under disparate impact theory).

[20] *Gilbert*, 429 U.S. at 138 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)). This Court acknowledged that benefit plan

One year after *Gilbert*, in *Satty*, plaintiffs challenged the employer's denial of sick pay for women disabled by pregnancy while granting sick leave to employees disabled from all other nonoccupational conditions. This Court held that the policy was "indistinguishable" from the policy in *Gilbert*, and, accordingly, did not constitute disparate treatment (434 U.S. at 143). However, the Court remanded for further proceedings to determine if the exclusion was pretextual.[21]

Read together, *Gilbert* and *Satty* foreclosed the vast majority of disparate treatment and disparate impact challenges to pregnancy-related exclusions from fringe benefit plans.[22] Although it foreclosed most challenges to benefit plans, however, this Court preserved the ability of women to challenge other pregnancy-related employment policies under disparate impact analysis.[23] The pri-

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distinctions based on pregnancy would constitute disparate treatment in violation of § 703(a)(1) if those distinctions were " 'mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.' " 429 U.S. at 135 (citation omitted). The plaintiffs in *Gilbert* did not challenge the employer's policies under the disparate impact theory. *Id.* at 137.

[21] The Court also held that an employer's denial of accumulated seniority to women returning to work following pregnancy leave, while granting such seniority to workers returning from any other disability leave, did not constitute impermissible disparate treatment, but had a disparate impact on women and thus contravened Title VII. *Satty*, 434 U.S. at 141.

[22] Dictum in *Satty* virtually precluded the future use of the disparate impact theory as a vehicle to attack pregnancy-related distinctions, or any distinction for that matter, in employee *benefit* plans. Referring to the wording of § 703(a)(2), *Satty* concluded that "it is difficult to perceive how exclusion of pregnancy from a disability insurance plan or sick-leave compensation program 'would deprive any individual of employment opportunities' or 'otherwise adversely affect his status as an employee' in violation of § 703(a)(2)." 434 U.S. at 144-45.

[23] As noted in *Satty*, women could challenge pregnancy-based policies that "would deprive [an] individual of employment opportunities" or "otherwise affect his status as an employee" using § 703(a)(2)'s disparate impact analysis. 434 U.S. at 144-45. Indeed, the plaintiff in *Satty* did so successfully. *See supra* n.21.

mary focus of Congressional concern in passing the PDA was to restore disparate treatment analysis as a basis for challenging the exclusion of pregnancy and "related medical conditions" from fringe benefit plans.[24] At the same time, Congress sought to apply that same analysis to other pregnancy-related employment policies.

Congress acted promptly to overrule *Gilbert's* and *Satty's* refusal to apply section 703(a)(1)'s disparate treatment theory to pregnancy-related policies. Passed less than a year after *Satty*, the PDA added the following provision to the definitional section of Title VII:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.*[25]

B. The PDA Bars Only Disparate Treatment of Pregnant Women and Similarly Situated Employees.

The proper interpretation of the 1978 amendment requires an examination of the "PDA's language against the background of its legislative history and historical context." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987). By ignoring the essential historical context of the PDA, and by focusing exclusively

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[24] This Court correctly observed in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987), that the "context in which Congress considered the issue of pregnancy discrimination" centered on extensive evidence of discrimination against pregnant women, "particularly in disability and health insurance programs like those challenged in *Gilbert* and [*Satty*]." Furthermore, "[o]pposition to the PDA came from those concerned with the cost of including pregnancy in health and disability-benefit plans and the application of the bill to abortion." *Id.* at 286.

[25] Title VII § 701(k), 42 U.S.C. § 2000e(k) (1982) (emphasis added).

on the first clause of the amendment, petitioners seriously misconstrue the entire thrust of the PDA, which merely was to restore the application of the disparate treatment theory of § 703(a)(1) to pregnancy-related policies. The PDA was not designed to excuse plaintiffs challenging pregnancy-based policies from shouldering the burden of showing that the pregnancy-related policy constituted unequal treatment and failed to achieve "comparability among employees."[26] Thus, while the PDA made "clear that distinctions based on pregnancy are *per se* violations of Title VII,"[27] the question remained as to what other group was to be compared with pregnant women to determine whether an impermissible distinction existed. The PDA's second clause sets forth the relevant comparison.[28]

Unlike non-pregnancy based gender distinctions involving distinctions between women and men, the comparison required by the PDA was not between pregnant women and men, but between women affected by pregnancy and other employees who are similarly situated. This is made clear not only in the plain language of the statute, but also in the committee reports and debates. The House Report confirmed that "[t]he bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability

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[26] S. Rep. No. 331, 95th Cong., 1st Sess. 5 (1977) ("*Senate Report*"). *See also* H.R. Rep. No. 948, 95th Cong., Sess. 4 (1978) ("*House Report*") ("Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute.").

[27] *House Report* at 3.

[28] Petitioners and *amici* Equal Rights Advocates, *et al.*, recognize the existence of the second clause but, without any support in the legislative history, suggest that it is relevant only to the BFOQ defense and not to the issue of whether disparate treatment exists. Pet. Br. 31-33; Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 20.

to work."[29] An identical description appears in the Senate Report. *Senate Report* at 4. As the Senate Report makes clear, the second clause of the PDA requires a straightforward, two part analysis: First, women affected by pregnancy, childbirth or related medical conditions "who are able to work must be permitted to work on the same conditions as other employees." *Id.* at 4. Second, women who are "not able to work for medical reasons . . . must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working." *Id.* As the Senate Report concluded:

> Under this bill, the treatment of pregnant women . . . must focus not on their condition alone but on the actual effects of that condition on their ability to work.[30]

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[29] *House Report* at 4. *See also id.* at 3 (The bill "specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.").

[30] *Senate Report* at 4. Petitioners concede that this statement from the legislative history accurately reflects Congressional intent. Pet. Br. 32. The EEOC's *Questions and Answers on Pregnancy Discrimination*, published promptly after the PDA's passage, also reflect this central purpose of the PDA:

> The *basic principle* of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. 29 C.F.R. § 1604 (App.) (emphasis added).

This view of the legislative history has been confirmed in law review commentary:

> The Senate committee report clearly states that the basic standard embodied in section 701(k) is "comparability among employees." As one senator explained in debate, the "touchstone of compliance" with the amendment is equality of treatment. Both the literal language of the amendment and abundant, unambiguous legislative history compel this interpretation of the subsection. Thus, differential treatment of employees for any employment related purpose must be based on differences in the employees' ability or inability to work

Senator Williams, the floor manager of the bill in the Senate, clearly stated this standard during the Senate debate on the PDA:

> The central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work. *The key to compliance in every case will be equality of treatment.*[31]

Senator Javits, a co-sponsor of the bill, also made it clear that "[t]he bill requires equal treatment when disability due to pregnancy is compared to other disabling conditions . . . . [T]he bill adopts as its standard equality of treatment . . . ." [32]

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rather than on differences in sex, including differences resulting from pregnancy, childbirth or related medical conditions. Note, *The 1978 Pregnancy Discrimination Act: A Problem of Interpretation*, 58 Wash. U. L. Q. 607, 628-29 (1980) (footnotes omitted). Congress recognized that "principles of comparable treatment would provide full redress to the inequities of such practices," and that "[t]his intent is codified in the PDA's second clause which functions specifically to reverse *Gilbert*." Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 937 (1985) (footnotes omitted).

[31] 123 Cong. Rec. 29,385 (1977) (emphasis added).

[32] *Id.* at 29,387. Similar views were expressed in the hearings. For example, Senator Kennedy stated:

> [The bill] merely requires that employers who have disability plans for their employees treat pregnancy-related disabilities in the same fashion that all other temporary disabilities are treated with respect to benefits and leave policies.
>
> Unless we change the law, an employer can now provide disability income protection benefits for cosmetic surgery but not provide such benefits to women whose genuine disability is pregnancy related.

Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources ("*Senate Hearings*"), 95th Cong., 1st Sess. 26 (1977) (prepared statement of Senator Kennedy). *See also Senate Hearings* at 7 ("the legislation would require that disability based on pregnancy, childbirth, or related medical conditions be treated as any other disability under a company plan") (statement of Senator Bayh).

Similarly, Representative Hawkins, the floor manager of the bill in the House, stated:

> [E]mployers . . . must treat pregnant women as they treat other employes similar in their ability, or inability, to work. This means, for example, that if an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers have done in the past, while they are perfectly able to perform their jobs.[33]

Finally, and perhaps most significantly, the committee reports and the other legislative history of the PDA make clear that Congress' goal in adopting the PDA was "approval of the views of the dissenters in *Gilbert*." [34] Yet neither of those dissents favored a comparison between pregnant women and male employees. Quite the contrary. Justice Brennan at the outside of his opinion made clear that his dispute with the majority concerned whether "a private employer can adopt a disability plan that compensates employees for all temporary disabilities except one affecting exclusively women, pregnancy." *Gilbert*, 429 U.S. at 146. Similarly, Justice Stevens stated that his disagreement with the majority related to the employer's treatment of pregnancy "differently from any other kind of absence . . . ." *Id.* at 161. Senator Javits confirmed that this was the Congressional reading of *Gilbert*:

> We do not want pregnancy discriminated against, as contrasted with a broken leg or a strep throat or appendicitis or some other basis for disability.

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[33] 123 Cong. Rec. 10,582 (1977) (introductory remarks of Representative Hawkins).

[34] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 n.6 (1987). *See also House Report* at 2 ("[i]t is the Committee's view that the dissenting justices correctly interpreted the Act"); *Senate Report* at 2 (the two dissenting opinions "correctly express both the principle and meaning of Title VII").

> That was the basis of the decision of the U.S. Supreme Court in the Gilbert case—to wit, that we in the Congress had not covered that point with respect to pregnancy. So now we are covering it.[35]

Thus, while Congress intended to bar distinctions based on pregnancy or related medical conditions that were arbitrary or stereotypical, the legislation was clearly not intended to foreclose differentiation based on equal treatment of similarly situated employees. In order to constitute a violation of the PDA's prohibition of disparate treatment, a plaintiff must compare the employer's treatment of women affected by pregnancy with the employer's treatment of employees who have other disabilities but are similar in their ability or inability to work.

C. The PDA Does Not Foreclose Consideration of Employee and Fetal Health.

Petitioners, as well as Judge Easterbrook in his dissent below (Pet. App. 74a), urge that even if the second clause of the PDA is viewed as establishing the relevant standard, this Court should look only at an employee's bare ability to do a job's functional tasks, without regard to the risks—no matter how serious—of congenital birth defects to children born to an employee exposed to toxic substances. Pet. Br. 31-33. Contrary to these suggestions, Congress did not confine the PDA's notion of "ability or inability to work" solely to the question of whether an employee could perform a job. Employee health and the risk of birth defects were a central ingredient of "ability to work" under the statute. If they were not, employers could refuse to give pregnant employees disability leave and other benefits based on the facile argument that their "ability to work" had not been impaired by their pregnancy, only their health or that of their offspring.

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[35] 123 Cong. Rec. 29,654 (1977).

While Congress did not focus specifically on risks associated with exposure of pregnant women to hazardous substances,[36] Congress was concerned with women who were "not able to work for medical reasons" (*Senate Report* at 4), and the interest in the health of a woman's offspring constituted a primary Congressional concern in passing the PDA. Senator Kennedy, a member of the committee reporting out the Senate bill, stressed the importance of the PDA in addressing the concern that a pregnant woman might feel compelled to risk harm to her unborn child by continuing to work in order to continue to receive benefits:

> There will be tens of millions of expectant mothers who will have to make that choice [between surrendering benefits or continuing to work]. That is bad health care policy; it is bad for the mother; it is bad for the child. You have the statistics here in terms of the incidences of mental retardation, infant mortality, child complications either from prematurity or from other factors.[37]

Clarence Mitchell, Director of the Washington Bureau of the NAACP and Chairman of the Leadership Conference on Civil Rights, also expressed such concerns:

> We want children not only to be born but we want them to be well born. We want mothers not to be restrained from carrying on that wonderful function of producing a fellow human simply because the future is uncertain and they don't know whether they would get the kind of benefits that people might get for getting an injury on the golf course.[38]

Patricia K. Putman, Associate Dean for Legal and Legislative Affairs, School of Medicine of the University of Hawaii, Honolulu, also emphasized the interests of the child who will be carried to term:

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[36] *See infra* n.40.

[37] *Senate Hearings* at 24. Senator Kennedy apparently was speaking of the costs associated with denying disability income payments to women who take time off because of pregnancy. *See Senate Hearings* at 26 (prepared statement of Senator Kennedy).

[38] *Id.* at 110.

> [P]roviding this kind of equality for women is not only a benefit to those women but also to their children, to their families, *and to the child that they may be bearing and will give birth to.* So it is not just for women alone.[39]

Thus, a primary purpose of the legislation was to protect fetal health. It would be anomalous in the extreme to construe such legislation to require employers to employ women in hazardous occupations that unquestionably jeopardized such health. There is not the slightest indication that Congress intended the PDA to have that effect so long as women were treated equally with similarly situated employees.[40]

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[39] *Id.* at 370 (emphasis added). To be sure, as petitioners point out (Pet. Br. 19), the legislative history also expresses concern that women might lose benefits and income if they were arbitrarily excluded from employment based on the fact of pregnancy. But this concern is perfectly consistent with a Congressional solution that required that women be treated equally with similarly situated employees.

[40] Relying on snippets of legislative history, *amici* Equal Rights Advocates, *et al.*, urge this Court to conclude that Congress consciously prohibited fetal protection policies when it enacted the PDA. Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 4-13. While the legislative history of the PDA reflects extensive concern with fetal health, it "is virtually void of any testimony or debate on the problem of exposing pregnant women to toxic work environments." Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1975 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63, 77-78 (1980).

Amici Equal Rights Advocates, *et al.*, rely on two vague statements by Senator Hatch, a congressional opponent of the PDA, and the only member of Congress even to advert to the issue, and one paragraph of the written submission of *amicus*, the Chamber of Commerce of the United States, which also opposed the legislation. Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 4-5.

Senator Hatch had the following exchange with Dr. Andre E. Hellegers:

> Senator Hatch. Do you think there would arise a whole slew of OSHA problems, occupational safety and health problems as a result of pregnant women?
>
> [Continued]

D. This Court's Decisions Confirm That the PDA Requires a Comparison of Pregnant Women and Similarly Situated Employees.

Since its enactment in 1978, this Court has applied the PDA in two cases, both of which support our view of the Amendment. *Newport News Shipbuilding & Dry*

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[40] [Continued]

> Dr. Hellegers. Let me put it this way: I have long been an advocate for a massive increase in research to deal with the effects of poisons, chemicals, physical or other agents on pregnant working women. However, two other things: Those agents are just as likely to affect the ovaries of nonpregnant women and there are in fact today companies that will not hire women on that specific basis.
>
> But you never dream of thinking that the same agents may also affect the testicles of men. So if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three, and we aren't doing much of that.

Senate Hearings at 67. Later that day Senator Hatch made a passing reference to "OSHA problems" in the course of a dialogue with Clarence Mitchell, Director of the Washington Bureau of the NAACP and Chairman of the Leadership Conference on Civil Rights:

> There are many problems that might arise in this. It is a complicated area.
>
> If we grant this particular bill we may have OSHA problems that we hadn't thought of, and maybe we should. *Senate Hearings* at 109-10.

Senator Hatch's statements are entirely consistent with the PDA as enacted. The effect of the bill was to prohibit the employer from treating pregnant women differently from other employees similarly situated, as Dr. Helleger's comments appear to suggest. Senator Hatch certainly did not suggest that under the bill every employer must routinely employ pregnant women regardless of the hazards of the job.

G. Brockwel Heylin, the representative of the Chamber of Commerce, stated in his testimony that the bill "would prevent an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child" and that the employer "would be powerless to deny the work to the child's mother during the pregnancy." *Legisla-*

Dock Co. v. EEOC, 462 U.S. 669 (1983), involved a male employee's § 703(a)(1) challenge to a company's health insurance plan. Although the company's plan provided female employees the same hospitalization coverage for pregnancy-related conditions as it provided for their other medical conditions, it provided less extensive coverage for pregnancy-related conditions of the spouses of male employees. The employer argued that the sole purpose of the PDA was to protect female employees and that male employees could not claim its protection to invalidate discriminatory treatment against their spouses. This Court rejected that argument, finding that the PDA overruled *Gilbert's* rationale, not just its narrow holding relating to benefits provided to pregnant employees. While this Court thus held that "[t]he meaning of the first clause [of the PDA] is not limited

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tion to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 84 (1977). *See also Senate Hearings* at 482.

The Chamber's comments could hardly have been meant to suggest that in all circumstances the employer was "powerless" to protect employee and fetal health. Employers remained obligated under the OSH Act to do so in many circumstances, and empowered to do so at least when the BFOQ standard was satisfied. The Chamber's comments, like Senator Hatch's, were intended to suggest only that the employer's power was circumscribed by the requirement of similar treatment, not that the power was entirely eliminated. In any event, no member of Congress expressed agreement with the Chamber's views.

Congress's failure to "indicate any disagreement" (Br. *Amici Curiae* of Equal Rights Advocates, *et al.* 11) with a lone witness' view of the possible implications of the PDA, without more, can hardly be deemed to indicate Congressional acceptance of that view. Even comments by Congressional opponents of legislation are not a reliable guide to Congressional intent. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976). Given the importance, and salience, of the societal interest in preventing birth defects (*see supra* pp. 3-7), it is inconceivable that Congress would have consciously acted to prohibit employer fetal protection efforts in such an off-handed, unconsidered manner.

by the specific language of the second clause" and that the statute protects male as well as female employees (*Newport News*, 462 U.S. at 678 n.14), it is the second clause and not the first "which explains the application of the general principle to [pregnant] women employees."[41] *Id.* at 676.

In *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), this Court's second decision interpreting the PDA, the Court held that the PDA did not pre-empt a California state statute requiring employers to grant employees disabled by pregnancy, but not by other conditions, qualified rights of reinstatement following disability leave. The Court made clear that the second clause of the PDA states the governing standard. It then held, in effect, that the second clause of the PDA protected pregnant employees and their spouses from disparate treatment but did not protect other employees with similar disabilities from discriminatory treatment viv-a-vis pregnant employees. The Court stressed again the amendment's purpose in overruling both the holding and the rationale of *Gilbert*:

> By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert* . . . [T]he second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination *against pregnancy* is to be remedied.[42]

Neither *Newport News* nor *Guerra* held or implied that distinctions based on pregnancy do not require a comparison with similarly situated employees. Both recognized that the standard for the protection of employees who were pregnant or who had a related medical condition was equality of treatment with those simi-

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[41] The employer had argued that the PDA's reference in its second clause to individuals' "ability or inability to work" limited the PDA's application to female *employees*, and, therefore, the PDA afforded no protection to *non-employee spouses*. 462 U.S. at 679.

[42] 479 U.S. at 284-85 (emphasis added; citations omitted).

larly situated. Under that standard, as discussed in Part IV below, it is clear that the employer's policy here did not violate the PDA.

III. THE OCCUPATIONAL SAFETY AND HEALTH ACT SUPPORTS AN INTERPRETATION OF THE PDA THAT WOULD PRESERVE EMPLOYER POLICIES TO PREVENT BIRTH DEFECTS.

A. The OSH Act Encourages Employers to Institute Voluntary Programs to Protect the Health of Their Employees and Their Employees' Unborn Children.

Even if the language and legislative history of the PDA were less clear, the Occupational Health and Safety Act (Pub. L. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. § 651 *et seq.* (1988)) ("OSH Act")) supports a construction of the PDA that would permit employers to maintain non-discriminatory policies designed to protect employee and fetal health.

The OSH Act is designed to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). Even petitioners concede, as they must, that the protections of the OSH Act extend to the "reproductive health of workers, including the health of the children they bear." [43]

To achieve this goal, the OSH Act requires, among other things, the Secretary of Labor to promulgate health and safety standards. 29 U.S.C. § 655(a), (b). A related purpose of the OSH Act is to encourage employers to institute, voluntarily, health and safety programs providing greater protection than that mandated by the Secretary's standards. Thus, the statute's purposes and policy are to be accomplished, in part:

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[43] Pet. Br. 41 (citing 29 U.S.C. § 655(b) and *United Steelworkers v. Marshall*, 647 F.2d 1189, 1256 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981)). *See also* 43 Fed. Reg. 52,959 (1978) ("OSHA asserts that damage to the fetus represents impairment of the reproductive capacity of the parent and must be considered material impairment of functional capacity under the OSH Act.").

> (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions; [and]
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> * * * *
>
> (4) by building upon advances already made through employer . . . initiative for providing safe and healthful working conditions[.] [44]

The legislative history of the OSH Act underscores the concern of Congress that the statute encourage employers to take voluntary initiatives to improve workplace health and safety. The legislative history is replete with references to employers that were providing innovative and effective health and safety programs at the time the OSH Act was under consideration.[45] Senator Saxbe, in a written statement introduced before the Senate, spoke of "the fundamental judgment that what is needed is comprehensive Federal legislation which would . . . take advantage of and encourage further private initiative to assure safe and healthful employment." 116 Cong. Rec. 35,607 (1970)[46].

Since passage of the OSH Act, the Department of Labor's Occupational Safety and Health Administration ("OSHA") has implemented this statutory purpose by providing for Voluntary Protection Programs.[47] Under

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[44] 29 U.S.C. § 651(b)(1), (4).

[45] *See, e.g.*, 116 Cong. Rec. 36,512 (1970) (statement of Senator Saxbe) (noting that safety protections are given "prime attention" by larger employers); 116 Cong. Rec. 38,704 (1970) (statement of Representative Sikes) (noting that "[s]ome employers have demonstrated an outstanding degree of concern for the health and safety of their employees").

[46] *See also* 116 Cong. Rec. 36,512 (1970) (statement of Senator Saxbe).

[47] Notice of Implementation of Revised Voluntary Protection Programs ("Notice"), 47 Fed. Reg. 29,025 (1982).

the Voluntary Protection Programs, OSHA will remove from scheduled inspections those employers that comply with certain safety and health standards "*which go beyond OSHA standards in providing safe and healthful workplaces for their employees, and which want to do more than is required to help the agency accomplish the goals of the Act.*" Notice, 47 Fed. Reg. 29,025 (1982) (emphasis added). *See also* Clarifications to the Voluntary Protection Programs ("Clarifications"), 53 Fed. Reg. 26,339, 26,341-42 (1988). These programs "not only ensure that OSHA's standards are met, but go beyond the standards to provide the best feasible protection at [the] site."[48]

The Voluntary Protection Programs rest on a variety of fundamental and unassailable policy considerations. These include OSHA's "long [recognition] that compliance with its standards cannot . . . itself accomplish all the goals established by the Act. The standards, no matter how carefully conceived and properly developed, will never cover all unsafe activities and conditions." Clarifications at 26,341. In addition, these programs are necessary because "limited resources will never permit regular or exhaustive inspections of all of the Nation's workplaces." *Id.* Finally, OSHA recognizes that "employers and employees, because of their day-to-day experience in the workplace, *acquire a special knowledge of the processes, materials and hazards* involved with the job. This knowledge, combined with the ability to evaluate and address unique hazards quickly and to provide rewards for positive action, can be used by employers to improve workplace safety and health in ways simply not available to OSHA." *Id.* (emphasis added).

Ironically, in this case, the employer is being faulted for having used its "special knowledge of the processes,

[48] Clarifications at 26,341. The OSH Act, although encouraging voluntary action, does not require employers to institute such programs. *But cf. International Union, UAW v. General Dynamics Land Systems Division*, 815 F.2d 1570 (D.C. Cir.), *cert. denied*, 484 U.S. 976 (1987) (obligations under general duty clause).

materials and hazards involved" in working with lead as the basis for taking voluntary action to protect its employees and their unborn children. Yet this is precisely the kind of voluntary effort that the OSH Act encourages, and without which the cause of improving employee safety and health would surely suffer.

Petitioners' reliance on OSHA's 1978 lead standard in support of their position (Pet. Br. 2-3, 41-42) is thus entirely misplaced. OSHA's failure to establish a separate, lower exposure level for women simply means that, under the OSH Act, companies do not violate the statute by employing fertile women in jobs involving exposure to lead within the limits set by the standard. The OSHA lead standard manifestly did not, as urged by petitioners (Pet. Br. 41-42), preclude the adoption of policies that would achieve greater protection from birth defects than that required by law.

Given the well-documented hazards associated with exposure to lead, it is particularly appropriate that employers take voluntary action to provide a greater level of protection for lead-exposed employees than that required by the lead standard. Indeed, the lead standard encourages employers to take voluntary action to protect against birth defects caused by congenital lead poisoning. It gives employers "broad flexibility" to manage fetal health risks posed by exposure of fertile women to lead. 29 C.F.R. § 1910.1025, App. C, at 182 (1989). The standard provides that physician-recommended safety practices "may be more stringent than the specific provisions of the standard." *Id.*

In short, if an employer, like the employer in this case, determines in good faith that an OSHA standard does not provide an appropriate level of protection, the OSH Act encourages that employer to provide additional protection. The purpose of the statute would not be served if employers were required to stand by and wait for OSHA to promulgate a new standard, rather than to act to prevent injury and illness based on their knowledge of their own workplaces.

B. Principles Of Statutory Construction Require the Court to Interpret the PDA in the Light of the OSH Act.

In passing the PDA in 1978, Congress did not intend to undermine fundamental purposes of the OSH Act, enacted nearly eight years earlier. Nothing in the language or legislative history of the PDA suggests that it prevents employers from voluntarily adopting policies designed to prevent birth defects; as we have discussed, such policies are entirely consistent with the purposes of the PDA. Under established principles of statutory construction, this Court should not construe the PDA to vitiate the policies of the OSH Act.

This Court has recognized, in many contexts, that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." [49] As this Court noted in the *Regional Rail Reorganization Act Cases*:

> "A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled. . . . Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end . . . ." [50]

[49] *Morton v. Mancari*, 417 U.S. 535, 551 (1974). *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-18 (1984) (Federal Insecticide, Fungicide, and Rodenticide Act did not repeal by implication the Tucker Act); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (Wildlife Refuge Revenue Sharing Act did not partially repeal by implication the earlier Mineral Leasing Act; Court noted: "We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." (citation omitted)); *FAA v. Robertson*, 422 U.S. 255, 265-67 (1975) (Freedom of Information Act did not repeal by implication non-disclosure provisions of the Federal Aviation Act). *Cf. Tidewater Oil Co. v. United States*, 409 U.S. 151, 164-65 (1972) (28 U.S.C. § 1292(b) did not affect this Court's jurisdiction under the Expediting Act).

It is particularly significant that, in *Morton v. Mancari*, 417 U.S. 535 (1974), this Court adopted this approach with regard to Title VII. *Morton* involved the question of whether the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e-16(a) (1988) ("EEOA")), which amended Title VII, impliedly repealed Section 12 of the Indian Reorganization Act of 1934 (48 Stat. 984, 25 U.S.C. § 472 (1988) ("Section 12")), a provision that broadly authorized a policy of preferential hiring of Native Americans in the Bureau of Indian Affairs. The agency had implemented the policy and incorporated it into its programs for many years. Shortly after the EEOA made Title VII applicable to federal employment, the preference was challenged on the ground that it was inconsistent with, and repealed by, the EEOA. This Court refused to find that the EEOA impliedly repealed Section 12, even though "the words of the [EEOA], if taken literally, would have worked a repeal of an Indian preference policy . . . ." *Watt v. Alaska*, 451 U.S. 259, 281 (1981) (citing *Morton*).

The Court in *Morton* noted two factors, among others, which made the case "prototypical" for construing the statutes harmoniously. Each of these factors applies here. First, in *Morton*, applying Title VII to bar the preference would contravene a "longstanding, important component" of the prior legislation. 417 U.S. at 550. So here, the OSH Act's policy of encouraging employer initiatives constitutes a "longstanding, important component" of that statute. Second, this Court in *Morton* recognized that Title VII was not intended to deal with the problems addressed by the earlier Indian preference legislation. *Id.* Here, as well, Congress did not intend the

[50] 419 U.S. 102, 134 (1974) (quoting with approval *In re Penn Central Transp. Co.*, 384 F. Supp. 895, 943 (Regional Rail Reorg. Ct. 1984)).

PDA to bar voluntary employer programs to protect the health of their employees.

Under these circumstances, this Court should construe the PDA to permit voluntary employer programs to protect employees and their offspring as long as those programs afford equal treatment to all employees whose exposure to toxic substances poses substantially similar risks to fetal health.

IV. PETITIONERS HAVE FAILED TO SHOW THAT THE EMPLOYER'S FETAL PROTECTION POLICY VIOLATED THE PDA.

Petitioners have not met their burden of establishing that the employer's policy at issue here fails the test of equality. There can be no question that plaintiffs here bear the threshold burden of establishing disparate treatment.[51]

To establish a prima facie case of disparate treatment in this case, petitioners had to show that (a) the employer's policy was pretextual, or (b) that it was arbitrary, or (c) that it treated fertile women differently than other workers whose employment posed the same substantial risk of birth defects. This petitioners failed to do.

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[51] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Petitioners concede they have the initial burden of establishing disparate treatment. Pet. Br. at 14.

This Court's decision in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1789 (1989), contains references to two other Court of Appeals decisions that considered fetal protection policies (*Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 1548 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172, 1187 (4th Cir. 1982)), as having appropriately placed the burden of proof regarding the business necessity defense on the employer. *Price Waterhouse* does not alter the general rule that the burden of proof to establish disparate treatment is on the plaintiff; it holds only that where prohibited discrimination plays an admitted role, the burden to show that other factors were determinative lies with the employer.

Petitioners do not suggest that the employer's policy here is pretextual. Nor can petitioners establish that the policy is arbitrary, in light of the well-established hazards of lead exposure. For example, the OSHA rulemaking hearings on the lead standard concluded that "[t]he evidence describing adverse effects from lead exposure to the fetus and newborn was uncontroverted . . . . There was, in fact, virtually no debate on the issue of whether the fetus and newborn are at risk from exposure to lead." 43 Fed. Reg. 54,398 (1978). As the Court of Appeals found here, "overwhelming medical and scientific research data demonstrate a substantial risk to the unborn child from lead" through exposure of female employees. Pet. App. 32a. Petitioners concede that "there was no dispute among the experts" on the risk posed by employing women. Pet. Br. 5.

In both courts below, petitioners' efforts "have primarily been devoted" to the third of these questions, namely, to showing a comparable risk of birth defects through exposure of male workers to lead. Pet. App. 33a. Had petitioners been successful in those efforts, they would have established the disparate treatment of similarly situated employees necessary to satisfy their initial burden under the PDA. But petitioners were not successful. The Court of Appeals found petitioners' evidence, "at best, speculative and unconvincing." Pet. App. 34a.[52]

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[52] In light of the rulemaking record underlying OSHA's 1978 lead standard, it is difficult to understand OSHA's observation that the evidence regarding lead exposure does not "create a basis for exclusion from work of any person, male or female, who is capable of procreating." 43 Fed. Reg. 54,398 (1978). The danger through exposure of women was admitted (*see* 43 Fed. Reg. 52,959 (1978)), and the danger through exposure of men was not proved.

OSHA recognized that there was a "dearth of this type of research" on the effects on men (*id.* at 54,392), and relied principally upon Dr. Ioana Lañcranjan's examination of 150 lead-exposed male Romanian battery workers as indicating strong male risks. *Id.* at 54,389. However, the Lancranjan study was limited to analyzing the effects of lead exposure on male fertility and did not focus at all on the fetal effects of such exposure. The study "engendered

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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much criticism during the lead hearings." *Id.* at 54,392. OSHA recognized that the Lancranjan study had been criticized and that "[i]t would be impossible without further research to eliminate all questions associated with the study." *Id.* at 54,393. Because the study did not even address the fetal effects of lead exposure, it provides no basis at all for an employer to ignore, for example, the CDC's conclusion in 1985 that "the OSHA standard is probably not sufficiently strict to protect the fetus." JA 184.

In its review of challenges to the lead standard, the District of Columbia Circuit found OSHA's position regarding the fertility risks to men of lead exposure to be supported by substantial evidence (*United Steelworkers v. Marshall*, 647 F.2d at 1258). This hardly suggests, much less requires, a finding that the employer's contrary conclusion here was arbitrary.